STATE OF NORTH DAKOTA

SEED ARBITRATION BOARD

IN THE MATTER OF:	)	
	)	
Nelson Farm Enterprises	)	
	)	**PROPOSED ARBITRATION**
vs.	)	**RECOMMENDATION**
	)	
Monsanto Company	)	
	)	

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On January 12, 2001, the North Dakota Seed Arbitration Board ("Board") received a request for seed arbitration ("Request") from Mr. Mark R. Fraase, Wegner, Fraase, Nordeng, Johnson & Ramstad, Fargo, North Dakota, representing Nelson Farm Enterprises ("Nelson Farm"), submitting a dispute in a seed transaction under N.D.C.C. § 4-09-20.2 and N.D. Administrative Code art. 100-02. With the Request, Mr. Fraase submitted a copy of the Monsanto Company's ("Monsanto") Complaint against Greg Nelson and Nelson Farm in federal district court in Missouri and a copy of Nelson Farm's answer to the Complaint.[1] The Request frames a seed dispute between Nelson Farm and Monsanto based on a seed transaction as more specifically spelled out in Monsanto's Complaint. Exhibit 1.

On January 18, 2001, Jeff Knudson, the Commissioner of Agriculture's designee on the Board, wrote to Mr. Fraase and said, among other things, that Nelson Farm needed to submit a filing fee with their request. On February 1, 2001, Nelson Farm submitted the appropriate filing fee.

On February 4, 2001, the Board requested the designation of an administrative law judge

[1] Greg Nelson is one of the members of the Nelson family operating the farming entity, Nelson Farm Enterprises in Cass County North Dakota. The other members listed in the Complaint are Roger Nelson and Rodney Nelson.

("ALJ") from the Office of Administrative Hearings to conduct an arbitration hearing and to issue a proposed arbitration recommendation for the Board to consider in issuing its final non-binding recommendation for resolution of a dispute under N.D.C.C. § 4-09-20.2. On February 16, 2001, ALJ Allen C. Hoberg was designated.

After the ALJ was designated, the Board surveyed the ALJ and the parties, Nelson Farm and Monsanto, to find a hearing date suitable and agreeable to the ALJ, the parties and the Board. *See* February 21 and February 23, 2001, letters from Jeff Knudson to Mr. Fraase and Monsanto. On March 8, 2001, the Board gave notice of a scheduled seed arbitration hearing, scheduling a March 27, 2001, hearing.

Meanwhile, on March 7, 2001, counsel for Monsanto, Daniel C. Cox, Thompson Coburn LLP, St. Louis, Missouri, wrote to Mr. Fraase. He said, among other things, that the action in federal district court preempts the state seed arbitration process and that the Nelson Farm Request was not timely filed with the Board. He asked for a postponement of the seed arbitration hearing.[2]

On March 8, 2001, Mr. Knudson responded by faxing a letter to Mr. Cox. In it he clarified his position about the specific nature of the dispute, noting that issues or further definition of the dispute is accomplished at the arbitration hearing. He also said that he did not believe there was good cause for a continuance of the hearing.

On March 8, 2001, Mr. Cox wrote to Mr. Knudson listing five matters that were not addressed by Mr. Knudson in his March 8 letter. He said Monsanto believes that this seed dispute is not a dispute involving a seed transaction and does not involve a seed defect or a labeling violation. He said that Monsanto believes that federal law preempts state law in the area

[2] He did not at this time ask for a dismissal or a denial of the hearing; neither did he submit any authority for any of his statements or claims. He copied several others with the letter, including Mr. Knudson

of patent law, and that the Nelson Farm Request was not timely filed. He asked for a postponement of the hearing or a denial of the Nelson Farm Request.

On March 21, 2001, Assistant Attorney General Paul Germolus, representing the Board, responded to Mr. Cox's March 8 letter. Mr. Germolus said, among other things, that whether in fact there exists a dispute involving a seed transaction is a matter now before the Board pursuant to the Nelson Farm Request, that the seed arbitration hearing, which may conclude with a final non-binding Board recommendation for the resolution of the seed transaction dispute, binds no one. He said that the Board does not adjudicate any claim. He further said that there is an exception to the 60-day filing requirement for seed arbitration requests when the seed labeler fails to notify the damaged party of the seed arbitration provisions, and that whether the exception was met could be considered at the hearing. He also said that Mr. Knudson had disqualified himself as a Board member to further consider the matter of this seed arbitration dispute.

The day before the scheduled hearing Mr. Cox faxed a letter to the ALJ, Mr. Germolus, Mr. Knudson, and the Commissioner of Agriculture. In the letter Monsanto states that in this matter there is no dispute involving a seed transaction as contemplated by N.D.C.C. ch. 4-09, and that if there is such a dispute that, under N.D.C.C. ch. 28-32, Monsanto was not properly served with a notice and specification of issues. Without such a notice and specification of issues, Monsanto says, state law "prohibits Monsanto's participation in any seed arbitration hearing. *See* North Dakota Century Code § 28-32-05." In the letter Monsanto further provides notice to "all interested persons and parties" that Monsanto "will not attend the hearing scheduled for Tuesday, March 27, 2001." The letter also provides notice that the federal court action is a dispute that

> "does not involve a seed transaction for which there is an alleged defect or violation of the requirements of North Dakota Century

> Code §§ 4-09-10, 4-09-11, 4-09-11.1, 4-09-11.2. [and that] To the extent that the issues to be considered in the Nelson's requested seed arbitration do not involve issues in the previously federal lawsuit (*sic*), which issues are within the exclusive jurisdiction of the United States District Court, but involve a seed transaction for which there is alleged defect or violation (*sic*) labeling requirements of North Dakota Century Code §§ 4-09-10, 4-09-11, 4-09-11.1, 4-09-11.2, Monsanto is ready, willing and able to participate with the proper notice and written specification of issues referenced above and mandated by the North Dakota Century Code § 28-32-05."

March 26, 2001, letter of Daniel C. Cox.

In response to the letter, Mr. Fraase faxed a letter to the ALJ asking, despite Monsanto stating that it will not participate in the scheduled hearing, "that the arbitration hearing go forward as scheduled." March 26, 2001, letter of Mark R. Fraase.

On March 26, 2001, the ALJ wrote to Mr. Cox and Mr. Fraase stating that he would "proceed with the arbitration hearing as scheduled in the absence of the Monsanto Company."

The arbitration hearing was held as scheduled on March 27, 2001, at the Doublewood Inn, Bismarck, North Dakota. Mr. Fraase represented Nelson Farm at the hearing. No one appeared for Monsanto. Board members Johnson,[3] Schlosser, and Gustafson were present at the hearing. Board members Tweed and Ashley were not present. Mr. Fraase's presentation on behalf of Nelson Farm included an opening statement and the presentation of three witnesses, Greg, Roger, and Rodney Nelson. He offered 19 exhibits, all of which were admitted. The Board asked questions of Mr. Fraase and the witnesses. Mr. Fraase also gave closing argument.

Based on the evidence presented at the arbitration hearing and the opening statements and closing argument made, the administrative law judge makes the following recommended findings of fact and conclusions of law.

[3] Commissioner of Agriculture Roger Johnson sat in place of Mr. Knudson who was disqualified as the Commissioner's designee.

FINDINGS OF FACT

1. The facts of this matter show that this dispute is a patent law and saved seed dispute arising from seed transactions between Monsanto and Nelson Farm.

2. Nelson Farm is a North Dakota farming entity operated by Greg, Roger, and Rodney Nelson in Cass County, North Dakota.

3. Monsanto is a Delaware Company in the business of developing, manufacturing, licensing, and selling agricultural biotechnology, agricultural chemicals, and other agricultural products. After the investment of substantial time, expense, and expertise, Monsanto developed plant biotechnology that involves the transfer into crop seed of one or more genes that gives the resulting plants various favorable traits such as making such plants resistant to glyphosate-based herbicides such as Monsanto's Roundup brand herbicide ("Roundup"). Monsanto markets a genetically improved soybean seed as Roundup Ready soybeans ("RR soybeans"). Roundup and Roundup Ready are registered trademarks of Monsanto.

4. Roundup is a non-selective herbicide manufactured by Monsanto which will cause severe injury or crop destruction to soybean varieties that are not Roundup Ready. Furthermore, plant life, other than that plant life that is Roundup Ready, displays a unique and identifiable symptomatology after having been sprayed with Roundup or other herbicide containing glyphosate.

5. Monsanto's Roundup Ready technology is protected under patents issued by the United States Patent Office, including U.S. Patent Numbers 5,633,435 and 5,352,605. These patents were issued and assigned to Monsanto prior to the events of this dispute.

6. Monsanto licenses the use of Roundup Ready seed technology to farmers at the retail marketing level.

7. Authorized purchasers of Roundup Ready seed are required to pay a license fee (also referred to as a "technology fee") for each commercial unit of seed in addition to the price of the base germplasm.

8. Monsanto places the required statutory notice that its Roundup Ready technology is patented on the labeling of all bags containing Roundup Ready seed. In particular, each bag of Roundup Ready seed is marked with notice of at least U.S. Patent No. 5,352,605 and 5,633,435.

9. N.D.C.C. ch. 4-09 is part of North Dakota's seed laws. Among other things, N.D.C.C. ch. 4-09 regulates the labeling of agricultural seed. In this dispute, Monsanto is the seed "[l]abeler" that labeled the seed in dispute in this matter before the Board. N.D.C.C. §§ 4-09-01(10)(11), 4-09-10, and 4-09-10.1.

10. Monsanto began an investigation about the farming activities of Nelson Farm after it received an anonymous phone call about Nelson Farm farming activities. Its investigation relates to Nelson Farm's soybean seed practices regarding purchasing, planting, harvesting, and saving soybean seed. Monsanto began this investigation and its federal lawsuit without first consulting with Nelson Farm about its soybean seed practices.

11. In late 1997, Nelson Farm first purchased Monsanto's RR soybeans for planting in the 1998 crop year. Nelson Farm paid for the seed and paid the technology fee for those soybeans. Nelson Farm purchased 112 units (50 lb. bags) of RR soybeans from Howe Seed Farms for planting in 1998 on a field infested with milkweed. Exhibit 7. Nelson Farm bought Stine 1284 RR soybeans, a soybean developed for use in southern Iowa, because these were the only such soybeans available to Nelson Farm for 1998 planting. The 1284s have a very long growing season and Nelson Farm was advised by the soybean dealer to plant the soybeans as

soon as possible in the spring. Nelson Farm planted the 1284s on its milkweed infested field in early May and harvested the 1284s in early October, 1998. Nelson Farm used Roundup on the soybean field containing the 1284s to destroy the milkweed infestation. Exhibit 8.

12. Nelson Farm delivered all of the 1284 RR soybeans harvested in October 1998 to the Prosper Farmers Cooperative Elevator ("Prosper") for marketing. Exhibit 9. None of that crop was saved for planting in 1999. Stine 1284s are not a variety suitable for planting in ND. Nelson Farm used 1284s in 1998 primarily to try a new technology in aide of weed infestation eradication. The Nelsons did not care whether they harvested very many bushels of soybeans from that field in 1998.

13. Nelson Farm next purchased RR soybeans in late 1998 and early 1999 for planting in the 1999 crop year. Exhibit 11. Nelson Farm purchased 2812.8 units of RR soybeans.

14. Nelson Farm also planted conventional soybeans in 1999 from its own conventional saved seed. It had 5258 bushels of saved conventional soybeans that it had cleaned for use in planting in 1999. Exhibit 13. This conventional soybean seed was cleaned and saved eight days before the 1998 RR soybeans were harvested for market in 1998.

15. Nelson Farm planted 1523.5 acres to RR soybeans in 1999 and 2359.1 acres to conventional soybeans in 1999. Exhibit 18. Nelson Farm did not use all of its purchased RR soybean seed or all of its cleaned and saved conventional soybean seed for planting in 1999. It had some of each left over.

16. Nelson Farm purchased all of the RR soybean seed it used in 1999 from reputable dealers and signed the Monsanto technology agreement for such seed in 1999. *See* exhibit 11 and exhibit A attached to exhibit 1 (Greg Nelson signed the technology agreement for Nelson

Farm on March 31, 1999). Nelson Farm paid for all the RR soybeans it planted in 1999, as well as the licensing fee (technology fee) for those soybeans.

17. Nelson Farm also used Roundup for its operations in 1999. It used it primarily on RR soybean plants but did make some other uses of it, too. Nelson Farm purchased just enough Roundup for its RR soybeans but, again, did end up using some for other uses.

18. The technical agreement with Monsanto that Nelson Farm signed in 1999 forbids Nelson Farm from using saved Roundup Ready seed in planting.[4]

19. The Complaint alleges that Nelson Farm used saved RR seed in 1999 and continues to use it (presumably in 2000). The evidence at the arbitration hearing clearly shows that Nelson Farm used no RR saved seed in its farming operations in 1999.

20. In 2000, Nelson Farm planted both 1999 saved conventional soybean seed and RR soybean seed from seed units legally purchased from Monsanto.

21. Nelson Farm admits that testing done by Monsanto or its agents may have discovered tissues from RR soybean stems and leaves in fields where Nelson Farm grew conventional soybeans.[5] Monsanto took tissue samples in the fall of 1999, after all of the Nelson Farm soybeans had been harvested and the fields tilled.[6] Nelson Farm showed at the hearing that it planted some RR soybeans in low spots in conventional fields. Nelson Farm also acknowledges that some RR soybean seed may have been planted on the edges of some conventional soybean fields. In other words there was some contamination of fields in that not

[4] *See* the Plant Variety Protection Act which allows farmers to do what the Monsanto technical agreement forbids. 7 U.S.C. § 2543; *see* also *Asgrow* case, Conclusion Of Law no. 3, *infra*. Query, whether the PVPA should apply to disputes such as this one rather than patent law?

[5] Nelson Farm had a smaller drill that it used for planting low spots in both RR soybean fields and in conventional soybean fields and that drill was most of the time filled with RR seed. Of course there is no harm in planting RR soybeans in conventional fields but planting conventional soybeans in RR fields, where Roundup is used, is not wise.

[6] What little evidence was presented about Monsanto testing shows that Monsanto may also have been inaccurate in locating Nelson Farm fields. Monsanto did not seek the Nelson's help in locating fields. Perhaps, Monsanto has more and better information from its testing and investigation of this matter that has yet to be revealed. Of course, positive results in testing by Monsanto mean nothing if Nelson Farm has paid for the germplasm and licensing or technology fee for each and every RR soybean it has planted.

all fields contained just RR soybeans or just conventional soybeans. This limited contamination of seed varieties is, apparently, not an uncommon occurrence on farms during the planting season when time is of the essence, but Nelson Farm proved that it did not use any RR soybeans in planting its 1999 crop for which the germplasm and technology fee had not been paid. Nelson Farm paid for both the germplasm and the licensing agreement for each and every RR soybean that it planted in 1999. Nelson Farm used no saved Stine 1284 or other saved RR soybean seed for planting in 1999. Because of its long growing season, it would have made little sense to continue to use Stine 1284 seed in North Dakota in 1999, after the milkweed had been eradicated in 1998. Nelson Farm could not possibly have had any other Roundup Ready saved seed available for planting in 1999 because, except for the 1284 variety, 1999 was the first year Nelson Farm used RR soybeans as part of its soybean plantings.

22. As far as Nelson Farm knows (and, of course, there was no evidence presented at the hearing by Monsanto regarding testing), Monsanto has not done any testing of Nelson Farm fields in 2000, despite Nelson Farm's insistence that Monsanto send someone out to test its fields in 2000. Monsanto refused to come out and participate in Nelson Farm's testing in 2000.

23. Although Monsanto apparently did no testing in 2000, Nelson Farm did considerable testing of its own soybean crop in 2000, including spraying of both conventional and RR soybeans with Roundup, to help prove that it planted no saved RR soybeans in its fields in 2000.

24. Nelson Farm has been cooperative with Monsanto in its investigations and testing, and has been cooperative with Monsanto in the federal action. Monsanto, however, has not been very cooperative with Nelson Farm, withholding information on tests, not telling Nelson Farm where it sampled for testing in 1999, and failing to attend an arbitration hearing requested by Nelson Farm to define and resolve seed dispute issues.

25. The evidence shows, by the greater weight of the evidence, that Nelson Farm planted no saved RR soybean seed in its fields in 1999 or 2000 without Monsanto's authority. Nelson Farm planted RR soybean seed in 1999 and 2000 only pursuant to payment made to Monsanto for the germplasm and the licensing fee.

26. The evidence shows, by the greater weight of the evidence, that Nelson Farm planted Stine 1284 RR soybeans in 1998 without signing any agreement with Monsanto, but Nelson Farm paid for those seeds, as it was required to do.

CONCLUSIONS OF LAW

1. Seed transaction is not defined in N.D.C.C. ch. 4-09. There is nothing in N.D.C.C. ch. 4-09 which indicates limits on the nature of disputes involving a seed transaction. The scope of the Board's authority is, therefore, broad, and it encompasses all possible *bona fide* legal disputes between a seed labeler and a seed customer in a seed transaction.

2. Monsanto is a seed labeler and Nelson Farm is a seed customer under N.D.C.C. ch. 4-09. *See* N.D.C.C. § 4-09-01(10) which defines seed labeler. Seed customer is not defined.

3. The Supreme Court has defined "saved seed" in the case of *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179 (1995). Although the *Asgrow* case is a Plant Variety Protection Act case, the science or art, concepts, and terminology are the same or similar and the definition of "saved see" applies in this matter. Under the *Asgrow* definition, as used in this matter, saved seed is simply the seed saved by Nelson Farm, grown in prior years, for replanting in a current year on its own farm.

4. Nelson Farm's filing of its Request was timely. *See* N.D. Admin. Code § 100-02-01-01. Considering the exception found in section 100-02-01-01, the filing was timely. However, the type of seed dispute filed by Nelson Farm does not fit well with the time limit

requirements of section 100-02-01-01, and the exception also does not squarely fit with this type of seed dispute. The hearing in this matter was held within 60 days of the request for hearing as also required by N.D. Admin. Code § 100-02-01-01.

5. The evidence does not show, by the greater weight of the evidence, that Nelson Farm is infringing on any Monsanto patents for RR soybeans by planting, growing, and harvesting unlicensed saved RR soybean seed without authorization from Monsanto, or that Nelson Farm will continue to so infringe. Nelson Farm did not plant any saved RR soybean seed in 1998, 1999, or 2000.

6. The evidence does not show, by the greater weight of the evidence, that by planting saved RR soybean seed in 1999, Nelson Farm intentionally and wrongfully exercised dominion, ownership, and control over RR technology which was the property of Monsanto under certain patents. Nelson Farm obtained all of the RR soybean seed it planted through legitimate purchase and through entering into license agreements with Monsanto.

7. The evidence does not show, by the greater weight of the evidence, that Nelson Farm was unjustly enriched and obtained profits from illegally using saved RR soybeans in 1999. Any Nelson Farm enrichment or profits from soybeans in 1998, 1999, or 2000 was pursuant to the legitimate, beneficial use in its farming operations of purchased RR soybean seed, saved conventional soybean seed, Roundup and other chemical products, and pursuant to other sound farming practices.

8. A seed arbitration hearing under N.D.C.C. § 4-09-20.2 is not an adjudicative proceeding subject to the provisions of the North Dakota Administrative Agencies Practices Act. *See* N.D.C.C. § 28-32-01(1)(7). The arbitration hearing scheduled for March 27, 2001, was pursuant to reasonable notice being given to the parties. Monsanto did not notify the Board of

any good cause for Monsanto not to attend the arbitration hearing. Monsanto failed to attend the arbitration hearing without good cause.

9. The Board's obligation under N.D.C.C. § 4-09-20.2 and N.D. Admin. Code art. 100-02 is to help disputants resolve seed transaction disputes and, failing resolution of all of the issues of a dispute at the arbitration hearing, to issue a non-binding recommendation for resolution of the issues of the dispute. Nothing in the Board's recommendation is binding on either party or on any court. However, any findings or recommendations by the Board are admissible as evidence in any subsequent proceeding involving the dispute. N.D.C.C. § 4-09-20.2.

RECOMMENDED ORDER

There has been no resolution of issues as a result of this arbitration hearing. Monsanto failed to participate in the hearing without good cause. However, Nelson Farm still wished to participate and did participate in the arbitration hearing, presenting a case on the issues for resolution by the Board, notwithstanding Monsanto's absence. The greater weight of the evidence shows that Nelson Farm does not owe Monsanto any damages for patent infringement, conversion, or unjust enrichment because the evidence presented shows that none of these occurred. Monsanto has presented no evidence proving its case and Nelson Farm has presented substantial evidence disproving Monsanto's case. Accordingly, the ALJ recommends that the issues of this dispute in this seed transaction be resolved by Monsanto seeking to have dismissed any actions it may have pending for damage claims arising out of RR soybean seed transactions with Nelson Farm for patent infringement, conversion, or unjust enrichment.

Dated at Bismarck, North Dakota, this 6th day of April, 2001.

State of North Dakota
Seed Arbitration Board
Hearing Officer

By: _____
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Administrative Law Judge
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